No. 82-118

Office - Supreme Court, U.S.
FILED
JUL 22 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CROWN, CORK & SEAL COMPANY, INC.,
Petitioner,

v.

THEODORE PARKER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

GEORGE D. SOLTER,
RICHARD J. MAGID,
WHITEFORD, TAYLOR, PRESTON,
TRIMBLE & JOHNSTON,
2000 First Maryland Bldg.,
25 South Charles Street,
Baltimore, Md. 21201,
752-0987,
Counsel for Petitioner.

The Daily Record Co., Baltimore, MD 21202

QUESTION PRESENTED

Whether the pendency of a proposed class action tolls the running of the ninety-day statute of limitations (under 42 U.S.C. § 2000e-5(f)(1) (1972)) for purposes of allowing Respondent (a putative class member) to file a separate, private Title VII action after certification of the putative class has been denied.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
OPINION BELOW	2
JURISDICTION	2
STATUTORY PROVISION AND RULE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
1. The Decision Below Directly Conflicts With Decisions Of The Second Circuit As To The Proper Interpretation Of The American Pipe Tolling Doctrine	4
2. The Decision Below Raises Significant And Recurring Problems Concerning The Judicial Administration Of Cases Brought Pursuant To Rule 23 Of The Federal Rules Of Civil Procedure	7
3. The Fourth Circuit Tolling Rule Seriously Erodes The Effectiveness Of Rule 23 And Multiplies Litigation	10
CONCLUSION	12
APPENDIX	1a
Parker v. Crown, Cork & Seal Company, Inc., 677 F.2d 391 (4th Cir. 1982)	1a
Parker v. Crown, Cork & Seal Company, Inc., 514 F. Supp. 122 (D. Md. 1981)	8a
United States Code, Title 42, § 2000e-5(f)(1) (1976)	17a
Federal Rules of Civil Procedure 23	18a

PAGE

TABLE OF AUTHORITIES

Cases

American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974) 4, 5, 6, 7, 8, 9, 10

Arneil v. Ramsey, 550 F.2d 774 (2nd Cir. 1977) 5, 6

Bantolina v. Aloha Motors, Inc., 419 F. Supp. 1116 (D. Hawaii 1976) 7

Burnett v. New York Central R.R. Co., 380 U.S. 424 (1965) 8

Gluck v. Amicor, Inc., 487 F. Supp. 608 (S.D.N.Y. 1980) 7

Gramby v. Westinghouse Electric Corp., 84 F.R.D. 665 (E.D. Pa. 1979) 7

In re Fine Paper Litigation, 632 F.2d 1081 (3rd Cir. 1980) 6

Jefferson v. H. K. Porter Co., 648 F.2d 337 (5th Cir. 1981) 7

Jefferson v. H. K. Porter Co., 485 F. Supp. 356 (N.D. Ala. 1980) 7

Nelson v. United Credit Plan, Inc., 77 F.R.D. 54 (E.D.C.A. 1978) 7

Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342 (1944) 8

Pendleton, et al v. Crown, Cork & Seal Co., Inc., Civil No. M-78-1734 (D. Md. filed Sept. 15, 1978) 3, 4

Sanders v. Faraday Laboratories, Inc., 82 F.R.D. 99 (E.D.N.Y. 1979) 7

Stull v. Bayard, 561 F.2d 429 (2nd Cir. 1977) 5

Sussman v. Lincoln American Corp., 587 F.2d 866 (7th Cir. 1978) 6

PAGE

Wachovia Bank & Trust v. National Student Marketing Corp., N.A. 650 F.2d 342 (C.A.D.C. 1980) 7

Wachovia Bank & Trust Co., N.A. v. National Marketing Corp., 461 F. Supp. 999 (D.D.C. 1978) 7

Wood v. Carpenter, 101 U.S. 135 (1879) 8

Statutes

42 U.S.C. § 2000e-5(f)(1) 2, 3

Rule

Fed. R. Civ. P. 23 .....2, 3, 6, 7, 10, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No.

CROWN, CORK & SEAL COMPANY, INC.,

Petitioner,

v.

THEODORE PARKER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Crown, Cork & Seal Company, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on April 23, 1982.

OPINION BELOW

The opinion of the Court of Appeals is reported in 677 F.2d 391. The opinion of the United States District Court for the District of Maryland is reported in 514 F. Supp. 122. Both opinions appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on April 23, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTORY PROVISION AND RULE INVOLVED

United States Code, Title 42, § 2000e-5(f)(1) (1976); (See p. 17a of Appendix hereto).

Federal Rules of Civil Procedure 23; (See p. 18a of Appendix hereto).

STATEMENT OF THE CASE

Respondent Parker, a black man, was discharged from his employment with Petitioner Crown, Cork & Seal Company, Inc. (hereafter "Crown") on July 15, 1977. On October 3, 1977, Respondent filed a charge of discrimination with the EEOC alleging racially discriminatory harassment and discharge by Crown. In a letter dated November 9, 1978 the EEOC issued a determination that there was no probable cause to believe that Respondent's charge of discrimination against Petitioner was true and issued to Respondent Parker a "Notice of Right to Sue." Mr. Parker received that "Notice of Right to Sue," but did not file suit within the statutorily prescribed period.

On September 15, 1978, Mr. Pendleton and Mr. Allen filed a Title VII class action in the United States District

Court for the District of Maryland, *Pendleton, et al v. Crown, Cork & Seal Co., Inc.*, Civil No. M-78-1734 (D. Md.), on their own behalf, and on behalf of all similarly situated black persons, alleging racial discrimination by petitioner in various employment practices, including harassment and discharge. On May 31, 1979 plaintiffs moved to certify a class, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, consisting of all black persons who were terminated by petitioner on or after January 12, 1973 and all black persons who were hired by petitioner on or after March 31, 1973. By a Memorandum and Order dated September 4, 1980, and after an evidentiary hearing, the District Court denied that motion for class certification.

On October 27, 1980 Respondent Parker filed the present Title VII action in the United States District Court for the District of Maryland alleging that Crown discriminatorily harassed and discharged him on account of his race. The jurisdiction of the District Court was invoked under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e, et seq. (general federal question jurisdiction). On November 25, 1980 Crown filed its answer denying Respondent's allegation of discrimination and moved for summary judgment against Respondent Parker. Crown asserted that nearly two years had passed since Respondent received his ninety-day notice to sue, and therefore, Respondent had not satisfied a jurisdictional prerequisite to his present suit. In a Memorandum and Order filed April 20, 1981, the District Court granted Crown's Motion for Summary Judgment. Judgment was entered on April 22, 1981 and Respondent appealed to the United States Court of Appeals for the Fourth Circuit.

On February 26, 1981 a stipulated order of dismissal with prejudice was signed by the District Court as the result of a settlement of the remaining individual claims

of Pendleton and Allen. On March 20, 1981 Appellant Parker filed a Motion, pursuant to Rule 24 of the Federal Rules of Civil Procedure, for leave to intervene in the case of *Pendleton and Allen v. Crown, Cork & Seal Co., Inc.*, Civil No. M-78-1734 (D. Md.), for purposes of filing an appeal of the denial of class certification. The District Court, by a Memorandum and Order dated April 16, 1981, granted Respondent's motion to intervene. Thereafter, on May 14, 1980, Respondent noticed an appeal of the denial of class certification in *Pendleton* to the Court of Appeals for the Fourth Circuit, but later consented to Crown's motion to dismiss that appeal as untimely filed.

In an Opinion dated April 23, 1982, the United States Court of Appeals for the Fourth Circuit reversed the summary judgment granted to Petitioners by the District Court on April 22, 1981, and remanded the case to the District Court for trial. The Fourth Circuit, noting the opposite conclusion reached previously by the Second Circuit, interpreted this Court's decision in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974), to mean that the pendency of a putative class action tolls the running of limitations against members of that putative class for purposes of both intervention *and* the filing of a new private suit.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW DIRECTLY CONFLICTS WITH DECISIONS OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT AS TO THE PROPER INTERPRETATION OF THE AMERICAN PIPE TOLLING DOCTRINE.

In 1974 the Supreme Court addressed the issue of tolling the statute of limitations in an antitrust suit and held that "the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to *intervene* after the court has found the suit inappropriate for class action status."

American Pipe & Construction Co. v. Utah, 414 U.S. at 552-53 (emphasis supplied). Subsequently, in *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 97 S. Ct. 2464, 53 L. Ed. 2d 423 (1977) the Court extended the rule enunciated in *American Pipe* for the limited purpose of allowing putative class members to appeal the denial of class certification, regardless of whether a final judgment was rendered. *United Airlines, Inc. v. McDonald*, 432 U.S. at 396. To date, the Supreme Court has neither directly nor indirectly established any further extension of the *American Pipe* tolling doctrine to include putative class members who file private actions after the statute of limitations has expired.

Recognizing the Supreme Court's present position, the Court of Appeals for the Second Circuit directly held that the *American Pipe* tolling doctrine does not extend to the commencement of a new action by a putative class member. *Arneil v. Ramsey*, 550 F.2d 774 (2nd Cir. 1977). In *Arneil v. Ramsey* the court maintained that the rule of *American Pipe* was intended solely for the purpose of allowing members of a putative class to intervene in an action after class status was denied. *Arneil v. Ramsey*, 550 F.2d at 783. One year later, the Second Circuit upheld its prior ruling in *Arneil* and concluded that an extension of the *American Pipe* doctrine to putative "class members who file separate suits after the class action has been terminated and the statute of limitations has expired is completely without merit." *Stull v. Bayard*, 561 F.2d 429, 433 (2nd Cir. 1977), *cert. denied*, 434 U.S. 1035, 98 S. Ct. 769, 54 L. Ed. 2d 783 (1978).

Contrary to the rulings of the Second Circuit, the Fourth Circuit Court of Appeals has held that "the correct reading of *American Pipe* is that the pendency of a putative class action tolls the running of limitations for members of the putative class both for purposes of intervention and the *filing of a new suit* based upon a cause of action embraced

within the putative class action until certification of the class is denied." (emphasis supplied). See p. 7a of Appendix hereto). In so holding, the Fourth Circuit specifically conceded that its interpretation of *American Pipe* conflicts with that adopted by the Second Circuit. Reasoning that the purpose of any statute of limitations "is to put defendant on notice of a claim with reasonable promptness" (see p. 6a of Appendix hereto), the Fourth Circuit declined to follow the Second Circuit's interpretation of the *American Pipe* tolling doctrine. Instead, the court below maintains that permitting the statute of limitations to be tolled for the purpose of intervention, but not for the purpose of instituting a new suit, "exalt[s] form over substance." (see p. 6a of Appendix hereto).

In *American Pipe & Construction Co. v. Utah*, the Supreme Court noted that if the statute of limitations was not tolled, it "would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure." 414 U.S. at 553. While the Second Circuit held that tolling the statute of limitations to allow the filing of a new private suit would be contrary to this purpose and "would result in the maintenance of another suit by plaintiffs . . .," *Arneil v. Ramsey*, 550 F.2d at 783, the Fourth Circuit reached the opposite conclusion, stating that if the statute of limitations was not tolled in this circumstance it would "violate the spirit and purpose of class action Rule 23," (see p. 7a n.4 of Appendix hereto), and "encourage the filing of individual suits or interventions by members of the putative class. . . ." (See p. 6a of Appendix hereto).

Thus, the conflict between the Fourth and the Second Circuits is complete.[1] The substantial benefit accorded to

[1] Decisions of the Seventh and Third Circuits in *Sussman v. Lincoln American Corp.*, 587 F.2d 866, 869 (7th Cir. 1978), *cert. denied*, 445 U.S. 942, 100 S. Ct. 1336 (1980), and *In re Fine Paper Litigation*, 632 F.2d 1081, 1087 (3rd Cir. 1980), provide

putative class members under the Fourth Circuit's extension of the tolling doctrine will unquestionably make that Circuit a uniquely hospitable forum for plaintiff class litigants and significantly affect the result of class litigation.

2. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE JUDICIAL ADMINISTRATION OF CASES BROUGHT PURSUANT TO RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The Fourth Circuit's extension of the *American Pipe* tolling doctrine is not limited to claims of discrimination under Title VII; rather it is quite clear that it applies broadly to all class actions under Rule 23 of the Federal Rules of Civil Procedure. Particularly since the Supreme Court has not had the occasion to address itself to the very broad issue involved, there are compelling reasons why some definitive guidelines in the application of tolling the statute of limitations in class actions should now be marked by this Court.

---

some general support for the Fourth Circuit's present rule. However, decisions by the District of Columbia and Fifth Circuits in *Wachovia Bank & Trust Co., N.A. v. National Student Marketing Corp.*, 650 F.2d 342, 346 (C.A.D.C. 1980), *cert. denied*, 452 U.S. 954, 101 S. Ct. 3098 (1981), and *Jefferson v. H. K. Porter Co.*, 648 F.2d 337, 339 (5th Cir. 1981), provide even more support for the Second Circuit's rule. District Court decisions are essentially split on the present issue: *Gramby v. Westinghouse Electric Corp.*, 84 F.R.D. 655, 662 (E.D. Pa. 1979) (tolling); *Green v. United States Steel Corp.*, 481 F. Supp. 295, 299 (E.D. Pa. 1979) (tolling); *Nelson v. United Credit Plan, Inc.*, 77 F.R.D. 54, 58 (E.D. La. 1978) (tolling); *Bantolina v. Aloha Motors, Inc.*, 419 F. Supp. 1116, 1121-22 n.19 (D. Hawaii 1976) (tolling); *Jefferson v. H. K. Porter Co.*, 485 F. Supp. 356, 360-61 (N.D. Ala. 1980), *aff'd.* 648 F.2d 337 (5th Cir. 1981) (no tolling); *Wachovia Bank & Trust Co., N.A. v. National Student Marketing Corp.*, 461 F. Supp. 999, 1012 (D.D.C. 1978), *rev'd on different grounds*, 650 F.2d 342 (C.A.D.C. 1980) (no tolling); *Gluck v. Amicor, Inc.*, 487 F. Supp. 608, 614-15 (S.D.N.Y. 1980) (no tolling); *Sanders v. Faraday Laboratories, Inc.*, 82 F.R.D. 99, 103 (E.D.N.Y. 1979) (no tolling).

(a) *Statutes of Limitation*

Statutory limitation periods are instituted on the theory that "even if one has a just claim, it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-349, 64 S. Ct. 582, 586, 88 L. Ed. 788, 792 (1944). Punishing the negligent person who asserts an otherwise meritorious claim ensures "fairness to defendant," *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 428, 85 S. Ct. 1050, 1054, 13 L. Ed. 2d 941, 945 (1965), and promotes "security and stability to human affairs." *Wood v. Carpenter*, 101 U.S. 135, 139, 25 L. Ed. 807, 808 (1879). In respect for these concepts, this Court applies the judicial tolling of statutory limitations only sparingly and, more importantly, only for the benefit of putative class members attempting to further the collective interest of the putative class by intervention or appeal. *See American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974) (intervention); *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977) (appeal of denial of class action).

The Fourth Circuit's wholesale and mechanical extension of the *American Pipe* tolling doctrine establishes a major and unprecedented incursion upon legislatively enacted statutes of repose. In *American Pipe*, this Court carefully considered the impact of the doctrine of judicial tolling upon legislatively prescribed statutes of limitation and concluded that federal courts have the power to toll statutes of limitation "under certain circumstances not inconsistent with the legislative purpose." 414 U.S. at 559. The Fourth Circuit's broad extension of the tolling doctrine, however, runs roughshod over all legislatively prescribed statutes of limitations, without any consideration of legislative purpose. Thus, under the Fourth Circuit

rule, a judicial tolling of limitations in derogation of statutory law, is automatically triggered by the mere filing of a lawsuit denominated a class action. At the same time, those benefited by the tolling of limitations depends in large measure upon the draftsmanship of the class action complaint, rather than a consideration of the applicable law or facts. Furthermore, the amount of time from the filing of a class action until denial of certification can realistically entail many months or years.[2]

(b) *Notice to Defendant*

A primary support for this Court's establishment of a tolling rule in *American Pipe* and *United Airlines* is the fact that the defendants in both cases were put on notice of potential class-wide liability by the filing of complaints seeking class relief. *American Pipe & Construction Co. v. Utah*, 414 U.S. at 554-555; *United Airlines, Inc. v. McDonald*, 432 U.S. at 395. In *American Pipe*, this Court stated:

> [w]ithin the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation, whether the actual trial is conducted in the form of a class action, as a joint suit, or as a principal suit with additional intervenors.

414 U.S. at 555. However, where a defendant is not only subject to liability through a class action and/or individual actions by the named class representatives plus intervenors, but is also subject to further liability in *separate private actions* by anyone or all of the putative class members, there is insufficient notice to the class action

[2] The Fourth Circuit rule does not consider that class certification can be denied or that decertification can occur at a late date, after appeal or remand. In addition, the present rule does not address successive or overlapping class actions, which could toll the applicable limitations period for an indefinite period of time.

defendant to justify an equitable tolling of the statute of limitations.

It is well recognized that the discovery and proof of a Title VII class action case, with its emphasis upon statistics and expert opinion, is markedly different from the discovery and proof of an individual action, with its emphasis upon a more limited set of facts and the credibility of lay witnesses. Admittedly, the notice provided to a defendant through the filing of a proposed class action suit should be enough to allow that defendant to make preparations (such as securing experts, collecting and analyzing data) for the defense of a class action as well as a defense against the claims of the named plaintiff. However, such notice is of little value if defendant is subject to separate individual actions for an indeterminate period of time by anyone falling within the parameters of a proposed class. Given such circumstance and the nature of the discovery and proof of individual actions, a defendant will unquestionably be prejudiced by the fact that "evidence has been lost, memories have faded, and witnesses have disappeared." *American Pipe & Construction Co. v. Utah*, 414 U.S. at 554. Certainly, a party opposing a putative class action cannot be expected to conduct an investigation of the facts and circumstances of each and every person falling within wide and often arbitrary boundaries set forth in a proposed class action complaint. Thus, an extension of the *American Pipe* tolling doctrine will unfairly prejudice defendants and provide an unjust advantage to plaintiffs who benefit from the tolling rule.

3. THE FOURTH CIRCUIT TOLLING RULE SERIOUSLY ERODES THE EFFECTIVENESS OF RULE 23 AND MULTIPLIES LITIGATION.

In fashioning the tolling rule in *American Pipe*, this Court gave careful consideration to the efficiency and economy of litigation as a principal purpose of Rule 23. *American Pipe & Construction Co. v. Utah*, 414 U.S. at

553. There, a major concern of the Court was avoiding a multiplicity of protective motions for intervention *in the proposed class action* by putative class members apprehensive about the likelihood of success of class certification. Under the Fourth Circuit rule, the threat to judicial efficiency and economy under Rule 23 is far more serious than a multiplicity of protective motions for intervention in the *same proposed class action*. Indeed, a denial of class certification will undoubtedly provoke a multiplicity of independent actions in various forums, each with its full complement of discovery, court proceedings, and potentially inconsistent results. Undoubtedly, there are countless individuals, corporations, and other legal entities throughout the nation who are, or were members of putative classes and who, under the rule below, can file private suits after certification has been denied to their class.

A Rule 23 class action is designed to provide a method for an efficient and final resolution of the common claims of many individuals in a single action. The effectiveness of a class action, in turn, must depend upon the support and interest provided by the members or putative members of the class. Where class certification is denied, the Fourth Circuit's tolling rule will unquestionably encourage putative class members to desert the class and file their own private actions, rather than remain with the class and appeal the denial of class certification. This will be especially true in Title VII cases where limitation periods are very short and generally expire before an appeal of the denial of class certification can be heard. Instead of strengthening and facilitating Rule 23, a broad tolling rule for the benefit of private actions will actually foster defections from the putative class, particularly by the more active and informed members. Thus, a judicial commitment to the broad intent and purpose of Rule 23 can only be undermined and disserved by authorizing the Fourth Circuit's extension of the *American Pipe* tolling doctrine.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

GEORGE D. SOLTER,
RICHARD J. MAGID,
WHITEFORD, TAYLOR, PRESTON,
TRIMBLE & JOHNSTON,
2000 First Maryland Bldg.,
25 South Charles Street,
Baltimore, Md. 21201,
Counsel for Petitioner.

APPENDIX

Theodore Parker,

Appellant,

v.

Crown, Cork and Seal Company, Inc.,

Appellee.

No. 81-1465.

United States Court of Appeals, Fourth Circuit.

Argued Dec. 7, 1981.

Decided April 23, 1982.

Discharged black employee appealed from a summary judgment of the United States District Court for the District of Maryland, James R. Miller, Jr., J., 514 F. Supp. 122, in favor of employer in an employment discrimination suit. The Court of Appeals, Harrison L. Winter, Chief Judge, held that running of 90-day statutory period in

which employee could commence his private Title VII action was tolled during period that there was pending a class action in which he was a member of the putative class but in which class certification was denied and action subsequently dismissed, even though he took no action to intervene as a named plaintiff in the class and did not seek to file an individual suit until after the class certification was denied.

Reversed and remanded.

1. Limitation of Actions — 126

Pendency of putative class action tolls running of limitations for members of putative class both for purposes of intervention and filing of new suit based upon cause of action embraced within putative class action until certification of class is denied.

2. Civil Rights — 40

Running of 90-day statutory period in which dismissed black employee could commence his private Title VII action to redress alleged racial discrimination in employment was tolled during period that there was pending a class action in which he was a member of the putative class but in which class certification was denied and action subsequently dismissed, even though he took no action to intervene as a named plaintiff in the class and did not seek to file an individual suit until after the class certification was denied. Civil Rights Act of 1964, §§ 701 et seq., 706(e) as amended 42 U.S.C.A. §§ 2000e et seq., 2000e-5(f)(1).

Norris C. Ramsey, Baltimore, Md., for appellant.

Richard J. Magid, Baltimore, Md. (George D. Solter, Francis John Gorman, Baltimore, Md., on brief), for appellee.

Before WINTER, Chief Judge, and PHILLIPS and MURNAGHAN, Circuit Judges.

HARRISON L. WINTER, Chief Judge:

The question we must decide is whether the running of the ninety-day statutory period, fixed by 42 U.S.C. § 2000e-5(f)(1), in which plaintiff could commence his private Title VII action to redress alleged racial discrimination in employment was tolled during the period that there was pending a class action in which plaintiff was a member of the putative class but in which class certification was denied and the action subsequently dismissed. The district court ruled that the running of the period was not tolled. 514 F. Supp. 122. We conclude otherwise. We reverse and remand for further proceedings.

I.

Plaintiff, a black male, was discharged by defendant on July 15, 1977. He duly filed a charge of discrimination with EEOC, alleging racially motivated harassment and termination. A right-to-sue letter issued on November 9, 1978.

Meanwhile, however, a class action against defendant alleging racial discrimination in employment in violation of Title VII was filed September 15, 1978. Plaintiff was a member of the putative class, and his claim was encompassed within the scope of the action. On July 13, 1979, a hearing was held and the court ruled on some, but not all, of the class certification issues. On September 4, 1980, the court finally denied class certification. The allegations of class-wide harassment were denied for lack of numerosity, and those of illegal termination because the named plaintiff, a probationary employee, was not representative of the class.

Plaintiff took no action to intervene as a named plaintiff in the class action; nor did he seek to file an individual

suit until after the class certification was denied. Plaintiff filed his own suit on October 27, 1980.[1]

He was promptly met by a motion for summary judgment on the ground that his suit was untimely since his right-to-sue notice issued November 9, 1978, and he did not file suit until October 27, 1980. Of course, as a factual matter, if the ninety-day statutory period for bringing suit was tolled until class certification was finally denied, unquestionably plaintiff instituted suit before the bar of the statute.

The district court granted summary judgment for defendant, ruling that plaintiff's right to file suit began to run on November 9, 1978, when he received his right-to-sue notification and that the running of the period was not tolled by the pendency of the intervening class action so as to permit plaintiff to file his own suit, although it would have tolled the running of the period had plaintiff sought to intervene in the putative class action after certification was denied.

II.

[1,2] As the district court recognized, the decision in this case depends upon the reading to be given to *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974). There, the Court held that "the commencement of the original class action tolls the running of the statute for all purported members of the class who make timely motions *to intervene* after the court has found the suit inappropriate for class action status." *Id.* at 552-53, 94 S. Ct. at 765-66 (emphasis added). The Court has not applied the holding in *American Pipe* in any other context, but in *Eisen v. Carlisle &*

[1] On February 26, 1981, the class action was settled by the named plaintiffs and defendant, and it was dismissed with prejudice on March 2, 1981. On March 30, 1981, plaintiff sought and was granted leave to intervene in the class action for the sole purpose of appealing the denial of class certification. His notice of appeal, however, was untimely and so we lack jurisdiction to consider the merits of the denial.

Jacquelin, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974), in deciding that notice must be sent to all members of a Rule 23(b)(3) class action because, *inter alia*, members of the class have a right to "opt out" of the class, the Court noted:

> Petitioner also argues that class members will not opt out because the statute of limitations has long since run out on the claims of all class members other than petitioner. This contention is disposed of by our recent decision in *American Pipe* . . . which established that commencement of a class action tolls the applicable statute of limitations as to all members of the class.

Id. 417 U.S. at 176 n.13, 94 S. Ct. at 2152 n. 13, 40 L. Ed. 2d at 748 n.13. So stated, the rule in *American Pipe* is not limited to intervenors but applies to all members of the class, or at least to those who "opt out" and, presumably, file individual suits during the pendency of the class action.

Whether to give the holding in *American Pipe* a broad reading to toll the statute so as to permit the filing of individual suits or to restrict it to cases where erstwhile timebarred plaintiffs seek only intervention has been the subject of conflicting adjudications in the district courts. *Compare, e.g., Green v. United States Steel Corp.*, 481 F. Supp. 295, 299 (E.D.Pa. 1979) with *Gluck v. Amicor, Inc.*, 487 F. Supp. 608, 614-15 (S.D.N.Y. 1980).

Among the circuits, only *Arneil v. Ramsey*, 550 F.2d 774, 782-83 (2 Cir. 1977), and *Stull v. Bayard*, 561 F.2d 429, 433 (2 Cir. 1977), *cert. denied*, 434 U.S. 1035, 98 S. Ct. 769, 54 L. Ed. 2d 783 (1978) have directly decided the issue of whether the tolling rule of *American Pipe* is limited to intervention and both held that it was. However, in applying *American Pipeline* in other contexts, both *Susman v. Lincoln American Corp.*, 587 F.2d 866, 869 (7 Cir. 1978), *cert. denied*, 445 U.S. 942, 100 S. Ct. 1336, 63 L. Ed. 2d 775 (1980), and *In re Finepaper Litigation*, 632 F.2d 1081, 1087 (3 Cir. 1980) stated the tolling rule

broadly enough to include new suits as well as motions to intervene in the aborted class action.

With due respect to the views of the Second Circuit, we think that *American Pipe* should be read to toll limitations with respect to a new suit as well as to a motion to intervene. The rationale of any statute of limitations is to put a defendant on notice of a claim with reasonable promptness so that defense evidence is not lost, memories have not faded and witnesses have not disappeared. *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49, 64 S. Ct. 582, 586, 88 L. Ed. 788 (1943). Where plaintiff's individual complaint is within the scope of the putative class action, those purposes are fully served since the defendant has "sufficient information within the statutory period to timely apprise [it] . . . of the nature and scope of the prospective litigation." *Haas v. Pittsburgh National Bank*, 526 F.2d 1083, 1097 n.19 (3 Cir. 1975).[2] Therefore, intervention is not barred by the statute of limitations, and it seems to us to exalt form over substance to say that intervention would be permitted but not institution of a new suit.

Moreover, such a rule would encourage the filing of individual suits or interventions by members of the putative class while the issue of class certification was unresolved,[3] adding additional burden and expense to the

[2] In *American Pipe*, class certification was denied solely for lack of numerosity. But the court in *Haas* applied the tolling rule of *American Pipe* in a situation where, as here, class certification was denied because the named plaintiff was not representative of his class, reasoning that the defendant is put on sufficient notice of the prospective issues so long as the members of the class and their claims have been identified by the filing of the class action. 526 F.2d at 1097.

[3] A putative class member preferring an individual suit to joining the representatives of the class if it fails would be forced to file a protective action before the statute of limitations had run on his individual claim. Even if a plaintiff would be content to intervene after a denial of certification, the prudent plaintiff would nonetheless intervene before the class issue is decided; if the representatives settle their claims after certification is denied, there would obviously be no suit in which to intervene.

defendant.[4] In addition, intervention is often at the discretion of the district court, Rule 24(b), F.R.Civ.P., and intervention may be denied if it will defeat the jurisdiction of the district court, if additional or extrinsic issues would be brought in by the intervenor, or if intervention would delay or prejudice adjudication of the rights of the original parties. 3B Moore's Federal Practice ¶ 24.10[4](1980). Thus the rule of *American Pipe*, if limited to intervenors, might achieve the inequitable result of allowing some putative members of the class to obtain an adjudication of their claims while excluding others.

Thus we are persuaded that the correct reading of *American Pipe* is that the pendency of a putative class action tolls the running of limitations for members of the putative class both for purposes of intervention and the filing of a new suit based upon a cause of action embraced within the putative class action until certification of the class is denied. We so hold.

REVERSED AND REMANDED.

---

[4] In *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 97 S. Ct. 2464, 53 L. Ed. 2d 423 (1977), in holding that plaintiff, a putative member of the class, was entitled to intervene after judgment to appeal the denial of certification, the Court said in support of its holding that a contrary decision would "induce putative class members to file protective motions to intervene to guard against the possibility that the named representatives might not appeal from the adverse class determination. . . . The result would be the very 'multiplicity of activity which Rule 23 was designed to avoid.'" *Id.* at 394 n.15, 97 S. Ct. at 2470 n.15 (quoting *American Pipe & Construction Co. v. Utah*, *supra*, 414 U.S. at 551, 94 S. Ct. at 765.) So, too, it can be said in the instant case that the effect of a contrary holding would violate the spirit and purpose of class action Rule 23.

Theodore Parker

v.

Crown, Cork & Seal Company, Inc.

Civ. A. No. M-80-2839.

United States District Court, District Maryland.

April 20, 1981.

Action was instituted on a complaint alleging that plaintiff was harassed and terminated from his employment because of his race. On motion of defendant for summary judgment, the District Court, James R. Miller, Jr., J., held that filing of class based claims in another case did not toll period of limitations with respect to plaintiff's filing of his individual action under equal employment statute until class certification motions in other case were denied, notwithstanding claim that plaintiff, as a member of classes proposed in other case, could borrow any tolling that occurred in that case and use it for purposes of his own action, where plaintiff was not a class member who sought to intervene in original class suit, but was seeking benefit of tolling rule in an independent action on which statute of limitations had otherwise run.

Motion granted.

1. Civil Rights — 40

Unless tolled on recognized and equitable grounds, running of the statutory 90-day period extinguishes forever an individual's right to bring a private action under the equal employment statute. Civil Rights Act of 1964, § 706(e) as amended 42 U.S.C.A. § 2000e-5(f)(1).

2. Civil Rights — 40

If a suit under the equal employment statute is not commenced within 90 days from the receipt by the claimant of the "Notice of Right to Sue" issued by the Equal Employment Opportunity Commission, the court is without jurisdiction to entertain the suit. Civil Rights Act of 1964, § 706(e) as amended 42 U.S.C.A. § 2000e-5(f)(1).

3. Civil Rights — 40

Where plaintiff, who received the first "Notice of Right to Sue" from the EEOC more than 90 days from the time suit for alleged discrimination in employment was filed, failed to allege any equitable considerations militating in favor of giving effect to second "Notice of Right to Sue" issued by the EEOC, including the filing of a purported class action which did not toll the period of limitations with respect to plaintiff's individual action, the second notice was without legal effect and, given expiration of statutory 90-day period subsequent to the first notice, the private suit filed by the plaintiff under the equal employment provision was barred. Civil Rights Act of 1964, § 706(e) as amended 42 U.S.C.A. § 2000e-5(f)(1); Fed. Rules Civ. Proc. Rules 23, 23(b)(2, 3), 28 U.S.C.A.

4. Limitation of Actions — 124, 126

The benefit of the tolling rule in *American Pipe*, that the commencement of the original class suit tolls the running of the statute for all purported members of the class who made timely motions to intervene after the court has found the suit inappropriate for class action status, is limited to those *class members who seek* to intervene in the original class suit and is inapplicable to independent suits on which the statute of limitations has otherwise run.

5. Civil Rights — 40

Filing of class based claims in another case did not toll period of limitations with respect to plaintiff's filing of his individual action under equal employment statute until

class certification motions in other case were denied, notwithstanding claim that plaintiff, as a member of classes proposed in other case, could borrow any tolling that occurred in that case and use it for purposes of his own action, where plaintiff was not a class member who sought to intervene in original class suit, but was seeking benefit of tolling rule in an independent action on which statute of limitations had otherwise run. Civil Rights Act of 1964, § 706(e) as amended 42 U.S.C.A. § 2000e-5(f)(1); Fed. Rules Civ. Proc. Rules 23, 23(b)(2, 3), 28 U.S.C.A.

Norris C. Ramsey, Baltimore, Md., for plaintiff.

George D. Solter, Richard J. Magid, and Francis John Gorman of Whiteford, Taylor, Preston, Trimble & Johnston, Baltimore, Md., for defendant.

MEMORANDUM AND ORDER

JAMES R. MILLER, Jr., District Judge.

The plaintiff, Theodore Parker, brought this Title VII action alleging that he was harassed and terminated from his job because of his race. The defendant, Crown, Cork & Seal Company, Inc. (Crown), has moved for summary judgment on the grounds that Parker did not file his complaint in this action within the 90-day period required by 42 U.S.C. § 2000e-5(f)(1). Parker has filed a memorandum opposing Crown's motion. The material facts necessary for a resolution of this motion are undisputed. Since only a legal question is presented, the court concludes that no hearing is necessary. Local Rule 6(E).

I. Factual Overview

On July 15, 1977, Parker was permanently discharged by Crown. (Paper No. 14, Ex. 4). On October 3, 1977, he filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC), alleging racially motivated harassment and termination by Crown (Paper No.

15, Ex. B; see Paper No. 14, Ex. 7). By letter dated October 19, 1977, the Maryland Commission on Human Relations (MCHR) notified Parker that his charge had been deferred to it for investigation (Paper No. 14, Ex. 6). The MCHR issued a written decision on September 20, 1978, finding no probable cause to believe that Parker had been terminated or harassed by Crown because of his race (Paper No. 14, Ex. 8).

On November 9, 1978, the EEOC issued a "Letter of Determination," addressed to Parker, Crown, and Parker's union, stating that there was no reasonable cause to believe that Parker's charge of racial discrimination was true. The letter also stated:

> "Should the Charging Party wish to pursue this matter further, he/she may do so by filing a private action in Federal District Court within 90 days of the receipt of this letter, and by taking the other procedural steps set out in the enclosed NOTICE-OF-RIGHT TO SUE."

Paper No. 14, Ex. 10.

A "Notice of Right to Sue" was issued by the EEOC on November 9, 1978. It was addressed to Parker at 1316 South Hanover Street, Baltimore, Maryland 21230, and to Crown at its corporate offices (Paper No. 14, Ex. 9). A second "Notice of Right to Sue," dated July 25, 1980, was issued to Parker and a copy was sent to Parker's lawyer (Paper No. 14, Ex. 11). This action was filed on October 27, 1980 (Paper No. 1). Parker's deposition establishes that he received the first "Notice of Right to Sue" by mail shortly after it was issued by the EEOC (Paper No. 14, at pp. 134-39).

II. Discussion

Crown contends that since the first "Notice of Right to Sue" was issued by the EEOC on November 9, 1978, and received by Parker shortly thereafter, the filing of the present case on October 27, 1980, is untimely under 42 U.S.C. § 2000e-5(f)(1) because the 90-day period had

expired. According to Crown, the second "Notice of Right to Sue" was without legal effect and did not operate to begin a new 90-day period.

Parker does not challenge directly Crown's contention that the 90-day period began to run from his receipt of the first notice. Instead, Parker contends (1) the filing of the purported class action in *Randy Pendleton et al. v. Crown, Cork & Seal Co., Inc.*, Civil Action No. M-78-1734, tolled the limitations period for all members of the classes proposed in that case; (2) the period of limitations did not commence to run again on the discrimination claims of the putative class members until the court issued its Memorandum and Order of September 4, 1980, denying the remaining class certification issues; and (3) as a member of the putative classes, he had 90 days from the court's Memorandum and Order of September 4, 1980, in which to file his individual Title VII suit. For the reasons set out below the court will grant Crown's motion for summary judgment.

[1, 2] It is well settled in this Circuit that unless tolled "on recognized equitable grounds," *Stebbins v. Nationwide Mutual Insurance Co.*, 469 F.2d 268, 269 (4th Cir. 1972), *cert. denied*, 410 U.S. 939, 93 S. Ct. 1403, 35 L. Ed. 2d 606 (1973), the running of the 90-day period set out in 42 U.S.C. § 2000e-5(f)(1) extinguishes forever an individual's right to bring a private Title VII action. *E.g., EEOC v. Cleveland Mills Co.*, 502 F.2d 153, 156 (4th Cir. 1974); *Bailey v. Boilermakers Local 667*, 480 F. Supp. 274, 282 (D.C.N.D.W.Va. 1979). Consequently, if a suit is not commenced within 90 days from the receipt by the claimant of the "Notice of Right to Sue" the court is without jurisdiction to entertain the action. *Menn v. Amstar Corp.*, 476 F. Supp. 303, 305 (D.C.D.Md. 1979). *See Garner v. E. I. DuPont De Nemours & Co.*, 538 F.2d 611, 614-15 (4th Cir. 1976).

[3] The undisputed evidence submitted by Crown demonstrates that Parker in fact received the first "Notice of Right to Sue" more than 90 days before the instant suit

was filed. Parker has not alleged any equitable considerations militating in favor of giving effect to the second notice. *See, e.g., Trujillo v. General Electric Co.*, 621 F.2d 1084, 1086-87 (10th Cir. 1980); *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241, 245-46 (5th Cir. 1980). The court concludes, therefore, that the second notice was without legal effect and Parker's 90-day period within which to file a private Title VII suit commenced to run upon his receipt of the first notice. *See, e.g., Cleveland v. Douglas Aircraft Co.*, 509 F.2d 1027, 1030 (9th Cir. 1975); *Ford v. General Motors Corp.*, 452 F. Supp. 355, 357 (D.C.E.D.Mo. 1978); *Fannie v. Chamberlain Mfg. Corp.*, 445 F. Supp. 65, 78 (D.C.W.D.Pa. 1977).

A more substantial issue is whether the filing of the class based claims in the *Pendleton* case tolled the period of limitations, with respect to Parker's filing of his individual action, until the class certification motions in *Pendleton* were denied. Parker contends that as a member of the classes proposed in *Pendleton*, he may borrow any tolling that occurred in that case and use it for the purposes of this case. In support of this argument, Parker urges this court to interpret broadly the Supreme Court's holding in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974).

American Pipe involved a private antitrust class action that had been filed eleven days before the running of the statute of limitations. The trial court subsequently denied the class certification motion on the ground that the purported class failed to satisfy the numerosity requirement of Rule 23(a)(1). Eight days after the entry of the order denying class status, a number of the putative class members moved to intervene as plaintiffs. The trial court denied their motions as untimely.

Reasoning that a refusal to toll the statute of limitations with respect to the claims of the putative class members, for the period between the filing of the suit and the trial court's ruling on the class certification motion, would

result in the filing of numerous intervention petitions prior to the class determination, the Court held that

> "the commencement of the original class suit tolls the running of the statute for all purported members of the class *who make timely motions to intervene after the court has found the suit inappropriate for class action status.*"

414 U.S. at 553, 94 S. Ct. at 766 (emphasis supplied).

Some Circuit Courts have suggested, *see, e. g., In re Fine Paper Litigation*, 632 F.2d 1081, 1087 (3d Cir. 1980); *Sussman v. Lincoln American Corp.*, 587 F.2d 866, 869 (7th Cir. 1978), *cert. denied, Eberstadt v. Flamm*, 445 U.S. 942, 100 S. Ct. 1337, 63 L. Ed. 2d 775 (1980), and some District Courts have apparently held, *see, e. g., Gramby v. Westinghouse Electric Corp.*, 84 F.R.D. 655, 662 (D.C.E.D. Pa. 1979); *Green v. United States Steel Corp.*, 481 F. Supp. 295, 299 (D.C.E.D.Pa.1979); *Nelson v. United Credit Plan, Inc.*, 77 F.R.D. 54, 58 (D.C.E.D.La. 1978); *Bantonlina v. Aloha Motors, Inc.*, 419 F. Supp. 1116, 1121-22 n.19 (D.C.D.Hawaii 1976), that the Supreme Court's decision in *American Pipe* created a broad, general rule that the statutes of limitation are tolled with respect to the claims of all putative class members until the trial court rules on the class certification motion. In effect, these cases suggest that a putative class member may take advantage of the tolling arising from the class suit, and maintain an independent action subsequent to the denial of the class certification motion, notwithstanding that such individuals did not seek to intervene in the original class suit.

Although there is dictum in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13, 94 S. Ct. 2140, 2152 n.13, 40 L. Ed. 2d 732 (1974), suggesting such a reading of *American Pipe* as applied to Rule 23(b)(3) suits, neither the facts nor the reasoning of *American Pipe* support the broad rule urged by Parker with respect to Title VII suits seeking class status under Rule 23(b)(2). The Court in *American Pipe* was concerned that if notice to members of a putative Rule 23(b)(3) class "did not reach them until

after the running of the limitation period," such persons would be compelled to file intervention motions prior to the class certification decision, thereby creating "the multiplicity of activity which Rule 23 was designed to avoid." 414 U.S. at 551, 94 S. Ct. at 765. The decision to allow intervention by class members subsequent to the trial court's decision to deny class status was held to be fair to the defendant because:

> "Within the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation, *whether the actual trial is conducted in the form of a class action, as a joint suit, or as a principal suit with additional intervenors.*"

414 U.S. at 555, 94 S. Ct. at 767 (footnote omitted) (emphasis supplied).

[4] The conclusion that the benefit of the *American Pipe* tolling rule is limited to those class members who seek to intervene in the original class suit, and is inapplicable to independent suits on which the statute of limitations has otherwise run, has been reached by a number of courts. *See, e. g., Stull v. Bayard,* 561 F.2d 429, 433 (2d Cir. 1977), *cert. denied,* 434 U.S. 1035, 98 S. Ct. 769, 54 L. Ed. 2d 783 (1978); *Arneil v. Ramsey,* 550 F.2d 774, 783 (2d Cir. 1977); *Gluck v. Amicor, Inc.,* 487 F. Supp. 608, 614-15 (S.D.N.Y. 1980); *Jefferson v. H. K. Porter Co.,* 485 F. Supp. 356, 360-61 (D.C.N.D.Ala. 1980); *Wachovia Bank & Trust Co. v. National Student Marketing Corp.,* 461 F. Supp. 999, 1012 (D.C.D.C. 1978). In addition, Part II of Judge Widener's opinion in *Paxman v. Campbell,* 612 F.2d 848, 855 (4th Cir. 1980) (en banc), in which all members of the court except for Judge Phillips concurred, suggests that if presented with the question, the Fourth Circuit would limit the rule of *American Pipe* to class members seeking to intervene in the original suit. *See also 3B Moore's Federal Practice* ¶ 23.-90[3] at 23-555 to 23-556 n.16 (1980) ("Although the statute of limitations is tolled by the filing of a class action for purposes of permitting a member of the purported class to intervene after the class has been

disallowed, it is doubtful that a class member will be permitted to bring an individual action after the statute of limitations has run.").

[5] Finally, the interpretation of *American Pipe* urged by Parker is unsupportable from a policy standpoint. Although relief under Title VII may be awarded on a class basis to those unnamed class members who have not exhausted their administrative remedies, *see, e. g., Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 771, 96 S. Ct. 1251, 1267, 47 L. Ed. 2d 444 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8, 95 S. Ct. 2362, 2370 n.8, 45 L. Ed. 2d 280 (1975), the rule urged by Parker would eviscerate Title VII's time limitations concerning suits brought by individual claimants. Under Parker's theory, if a broad based Title VII class action suit were filed against a particular defendant the period of limitations on all claims would be tolled. Once the trial court denied class status in the original suit, that defendant would be subject to untold numbers of individual Title VII suits brought by persons who had not timely pursued their administrative remedies.

In light of the purposes underlying Title VII's time limitations, this court doubts that the Supreme Court would sanction, or that Congress intended, the result urged by Parker. The court holds, therefore, that the tolling rule of *American Pipe* is applicable only to Title VII class members who seek intervention in the original suit. Consequently, Parker's 90-day period for filing suit was not tolled by the *Pendleton* suit, and his filing of the instant case on October 27, 1980, was untimely.

Accordingly, it is this 20th day of April, 1981, *ORDERED:*

(1) Crown's motion for summary judgment is GRANTED.

(2) The Clerk is instructed to forward a copy of this Memorandum and Order to counsel for the parties.

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the

person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

Fed. R. Civ. P. 23. Class Actions

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) **Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.**

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class

if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) **Orders in Conduct of Actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural

matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) **Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

As amended Feb. 28, 1966, eff. July 1, 1966.